Supreme Court, U.S.
FILED
JUL
12 2001
OFFICE OF THE CLERK

No. 00-1260

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

KIRBY HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to a search by a law enforcement officer investigating crimes.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Summary of argument	7
Argument:	
A search to investigate criminal activity based on the consent of a probationer given as a condition of release from custody is valid under the Fourth Amendment	10
A. Respondent's consent extends by its terms to searches conducted for investigative purposes	11
B. Respondent's consent to search was valid and enforceable as applied to searches conducted for investigative purposes	14
1. An individual may voluntarily give advance consent to a search	14
2. The relinquishment of a constitutional right may be made through an agreement with the government	18
3. Requiring consent to search as a condition of probation is not an unconstitutional condition	21
4. A probationer's consent to search is not invalid simply because the alternative is imprisonment	23
5. There is no basis for limiting the validity of respondent's consent to "probation searches"	24
Conclusion	29

TABLE OF AUTHORITIES

Cases: Page

Bond v. *United States*, 529 U.S. 334 (2000) 25
Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 20, 21
Brady v. *United States*, 397 U.S. 742 (1970) 18, 19
Bumper v. *North Carolina*, 391 U.S. 543 (1968) 15
Bushman, In re, 1 Cal. 3d 767 (1970) 17, 22
City of Indianapolis v. *Edmond*, 121 S. Ct. 447 (2000) 25
Corbitt v. *New Jersey*, 439 U.S. 212 (1978) 19
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 22
Florida v. *Jimeno*, 500 U.S. 248 (1991) 12, 24-25
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 13, 20, 22, 27, 28, 29
Illinois v. *Rodriguez*, 497 U.S. 177 (1990) 14, 26
Katz v. *United States*, 389 U.S. 347 (1967) 17
McGautha v. *California*, 402 U.S. 183 (1971) 19
New York v. *Hill*, 528 U.S. 110 (2000) 15
North Carolina v. *Alford*, 400 U.S. 25 (1970) 19
Ohio v. *Robinette*, 519 U.S. 33 (1996) 18
People v. *Bravo*, 43 Cal. 3d 600 (1987), cert. denied, 485 U.S. 904 (1988) 11, 12, 13, 21
People v. *Mason*, 5 Cal. 3d 759 (1971), cert. denied, 405 U.S. 1016 (1972) 11, 17, 22
People v. *Reyes*, 19 Cal. 4th 743 (1998), cert. denied, 526 U.S. 1092 (1999) 18
People v. *Robles*, 23 Cal. 4th 789 (2000) 13
People v. *Woods*, 21 Cal. 4th 668 (1999), cert. denied, 529 U.S. 1023 (2000) 6, 13, 14, 17
Peretz v. *United States*, 501 U.S. 923 (1991) 15
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 7, 14, 15, 17, 18
Texas v. *Brown*, 460 U.S. 730 (1983) 17
Tyrell J., In re, 8 Cal. 4th 68 (1994), cert. denied, 514 U.S. 1068 (1995) 17-18

Cases—Continued: Page

United States v. *Mezzanatto*, 513 U.S. 196 (1995) 15, 19
United States v. *Olano*, 507 U.S. 725 (1993) 18
United States v. *Ooley*, 116 F.3d 370 (9th Cir. 1997), cert. denied, 524 U.S. 963 (1998) 4, 11
Washington v. *Chrisman*, 455 U.S. 1 (1982) 14
Whren v. *United States*, 517 U.S. 806 (1996) 6, 9, 13, 25, 26
Zap v. *United States*:
328 U.S. 624 (1946) 8, 15, 16
330 U.S. 800 (1947) 17

Constitution and statutes:

U.S. Const.:
Amend. I 22
Amend. IV ..... *passim*
18 U.S.C. 371 4
18 U.S.C. 844(i) (1994 & Supp. V 1999) 4
18 U.S.C. 922(g)(1) 4
Cal. Health & Safety Code § 11550(a) (West 1991) 2

Miscellaneous:

4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed. 1996) 23

In the Supreme Court of the United States

No. 00-1260

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 219 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. A petition for rehearing was denied on October 5, 2000 (Pet. App. 39a). On December 26, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 2001. The petition for certiorari was filed on February 2, 2001, and was granted on May 14, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On May 29, 1998, respondent Mark James Knights was placed on three years' summary probation for a violation of California Health and Safety Code § 11550(a) (West 1991).[1] Section 11550(a) makes it a misdemeanor for any person to use, or be under the influence of, specified controlled substances. Summary probation in California does not involve direct supervision by a probation officer. Pet. App. 4a. Among the terms stated on the probation order form was that respondent would "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50; Pet. App. 4a. Respondent signed the form, which stated (immediately above respondent's signature): "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." J.A. 50.

[1] See J.A. 36-37, 50. On that same date, respondent was sentenced to 90 days in jail, to commence on August 3, 1998. J.A. 50. Thus, respondent was sentenced to a term of probation of slightly more than two months, to be followed by a jail term of 90 days, to be followed by an additional period of probation. The events that gave rise to the present controversy occurred within the first week of respondent's initial probation period.

Three days after respondent was placed on probation, a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault near the Napa County Airport were pried open and set on fire with an incendiary device using a gasoline accelerant, causing an estimated $1.5 million in damage. Pet. App. 2a-3a; J.A. 45. Respondent had been suspected of prior acts of vandalism against PG&E property, based on his longstanding grudge against the company stemming from a theft-of-services complaint made against him by PG&E investigators and a prior discontinuation of respondent's electrical services for failure to pay his bill. He therefore immediately became a suspect in this case. J.A. 11-12, 35-36; Pet. App. 2a. On June 3, 1998, after the sheriff's office had made a variety of observations that suggested that respondent might be involved in the vandalism,[2] a sheriff's detective searched respondent's apartment, relying on the consent-to-search condition of respondent's probation order. Pet. App. 4a.[3] Based

[2] Shortly after the arson, a sheriff's deputy drove by respondent's residence and noticed that the hood of the pick-up truck parked in front was warm, suggesting a recent arrival. In addition, an associate of respondent was seen disposing of what appeared to be pipe bombs, and the associate's pick-up truck contained explosive materials and brass padlocks that appeared to match those taken from the PG&E power vault. Pet. App. 3a-4a; J.A. 14-16, 35-40.

[3] The officer who conducted the search subsequently attested that before searching respondent's apartment, he was aware that respondent was on probation "and that his residence was subject

on the evidence found in the search—including detonation cord, ammunition, liquid chemicals, chemistry and electrical manuals, drug paraphernalia, and a brass padlock stamped "PG&E"—respondent was arrested. J.A. 17; Pet. App. 4a-5a; C.A. E.R. 54.

2. Respondent was subsequently indicted by a federal grand jury for conspiracy to commit arson, in violation of 18 U.S.C. 371 and 18 U.S.C. 844(i) (1994 & Supp. V 1999); and for being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). J.A. 7-10. Respondent moved to suppress the evidence obtained in the June 3 search. Pet. App. 5a.

Relying principally on the Ninth Circuit's decision in *United States* v. *Ooley*, 116 F.3d 370 (1997), cert. denied, 524 U.S. 963 (1998), the district court granted respondent's motion to suppress. Pet. App. 15a-38a. The court explained that "[a]lthough not directly addressing the consent issue, [*Ooley*], implicitly if not directly, stands for the proposition that acceptance of a search clause as a condition of probation does not fully abrogate a defendant's Fourth Amendment rights." *Id.* at 25a. The court found that the detective who

to search at any time, with or without a warrant, warrant of arrest or probable cause, by any probation officer or law enforcement officer." J.A. 20. The officer explained that under California law, he was entitled to conduct such a search without prior approval from any probation officer, J.A. 20-21, and that in any event "because [respondent] was on summary probation, there was no probation officer specifically assigned to [respondent] that [the officer] could contact," J.A. 21. The officer further explained that at the time he conducted the search, he "believed there was probable cause to obtain a warrant to search [respondent's] apartment based upon [the officer's] ongoing investigation of [respondent's] criminal activities," and that he would have applied for such a warrant if the search condition had not been applicable. *Ibid.*; see also J.A. 27.

BEST AVAILABLE COPY

conducted the search had a "reasonable suspicion" that respondent may have been involved with incendiary materials, "the manufacture of which would be inconsistent with the rehabilitative aspects of his probation." *Id.* at 30a. The court held, however, that the search was conducted for the purpose of obtaining evidence in a criminal investigation into arson or manufacture of incendiary devices. *Id.* at 33a. Based on its conclusion that the search of respondent's house was undertaken for investigative rather than probationary purposes, the court held that the search was invalid and that the items seized therein should be suppressed. *Id.* at 33a-37a.

3. The court of appeals affirmed. Pet. App. 1a-14a.

The court of appeals acknowledged that "a person can consent to a search of his home," and that "[t]here * * * can be little doubt that [respondent] did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a. The court stated, however, that prior Ninth Circuit decisions "have made it clear that [a probationer's] consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Id.* at 8a. The court of appeals found no clear error in the district court's determination that the sheriff's department was investigating criminal activity, rather than conducting a "probation search," since the searching officer was interested in "ending the string of crimes" of which respondent was suspected and was not "interested in [respondent's] rehabilitation." *Id.* at 10a. While acknowledging that the searching officer in this case "had drawn some very good inferences from the facts," the court found that the officer "was using the probation term as a subterfuge to

enable him to search [respondent's] home without a warrant." *Ibid.*[4]

The court of appeals also rejected the government's contention that *Whren* v. *United States*, 517 U.S. 806 (1996), had superseded prior Ninth Circuit decisions distinguishing between probation searches and investigation searches. The Court in *Whren* held that a traffic stop based on probable cause is objectively reasonable, and therefore valid under the Fourth Amendment, regardless of the subjective motivation of the seizing officer. *Id.* at 811-819. The court of appeals found that holding to be inapplicable to this case, explaining that

> [h]ere the issue is not whether a search or seizure with probable cause should be invalidated because of an officer's subjective intentions. It is, rather, whether, without another basis for a warrantless home search, there was consent to the search in the first place. That is a different question entirely. It depends on whether the consent covers what the officer did.

Pet. App. 11a. The court acknowledged that "the California Supreme Court disagrees with our *Whren* analysis." *Ibid.* (citing *People* v. *Woods*, 21 Cal. 4th 668, 677-681 (1999), cert. denied, 529 U.S. 1023 (2000)). It stated, however, that the California Supreme Court "does not control our reading of federal constitutional

[4] The court of appeals acknowledged that "a true probation search can serve th[e] ends" of deterring the probationer from endangering the community and engaging in additional criminal activity. Pet. App. 13a. The court refused, however, to hold that the search in this case could be sustained as serving the same purposes. The court stated that to uphold the search on that basis would "indirectly eliminate our cases which rely on the difference between probation and investigation searches." *Ibid.*

law, and for the reasons already stated, we find its analysis unpersuasive." *Ibid.*

SUMMARY OF ARGUMENT

As a condition of his probation, respondent agreed to submit his person and property to a search at any time, with or without a search warrant or reasonable cause, at the request of any probation or law enforcement officer. That consent to search was valid and rendered the search of respondent's house by law enforcement officers reasonable within the meaning of the Fourth Amendment.

A. By its plain terms, respondent's consent extended to searches conducted for the purpose of investigating possible violations of the criminal law. There is no language in the consent form that limits its scope to searches conducted for any particular reason. And decisions of the California Supreme Court interpreting similar or identical consent-to-search provisions in other probation agreements confirm that searches conducted for investigative purposes fall within the scope of the consent. Accordingly, the search conducted of respondent's house was within the scope of his consent and was therefore reasonable, unless the Fourth Amendment rendered the consent invalid.

B. A consent to search in a probation agreement is valid and enforceable as applied to a search conducted for investigative purposes. Nothing in the Fourth Amendment prevents a defendant from granting such consent as a condition of release on probation.

1. A search conducted pursuant to voluntary consent need not be based on probable cause or authorized by a judicial warrant. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). While consent must be given voluntarily, a consent to search may be voluntary even

if it is motivated by a desire to avoid some concrete disadvantage or to obtain a benefit from the government. An individual may also give valid and binding prospective consent to a category of searches to be performed at unspecified times in the future. See *Zap* v. *United States*, 328 U.S. 624 (1946).

2. The rule that consent renders a search lawful accords with the general principle that an individual may choose to forgo assertion of his constitutional rights, either unilaterally or pursuant to an agreement with the government under which he receives a promise of favorable treatment. For example, the Court has repeatedly recognized that a criminal defendant's guilty plea may be valid and enforceable even when it is motivated by the defendant's belief that he is likely to face greater punishment if he proceeds to trial. A defendant may similarly agree to conditions on his release, rather than face the more onerous restrictions on his liberty that he would experience as a prisoner. Enforcing such consent-to-search terms furthers the long-term interests of defendants as a class, since trial judges might be less willing to offer probation if they lacked assurance that the probationer's compliance with the conditions of release could be closely monitored.

3. This Court's "unconstitutional conditions" jurisprudence suggests that a State may not condition an individual's release on probation on his agreement to waive a constitutional right that is wholly unrelated to his status as a probationer. A requirement that probationers consent to search, however, directly furthers the State's interest in the effective administration of its probation system. Because the premise of conditional release is that probationers require more careful monitoring than the average citizen, consents to such monitoring through searches are reasonably related to the benefit offered by the government as a quid pro quo.

4. A probationer's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is incarceration. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. Likewise, the voluntariness of the consent term at issue here cannot be attacked on the ground that release on probation, even with a consent-to-search condition, is substantially less onerous than incarceration. The government does not coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other.

5. There is no sound basis for limiting the validity of a probationer's consent to "probation" searches rather than "investigation" searches. As an initial matter, the validity of a consent search should not turn on the subjective motivation of the searching officer, but should turn instead on the objective justification for the intrusion in question. See *Whren* v. *United States*, 517 U.S. 806 (1996). In any event, because the most fundamental term of probation is that an individual must refrain from committing further crimes, a search intended to confirm or dispel the suspicion that a probationer has engaged in additional criminal activity directly serves a core probation purpose.

ARGUMENT

A SEARCH TO INVESTIGATE CRIMINAL ACTIVITY BASED ON THE CONSENT OF A PROBATIONER GIVEN AS A CONDITION OF RELEASE FROM CUSTODY IS VALID UNDER THE FOURTH AMENDMENT

Respondent was required, as one of the conditions of his probation, to "[s]ubmit his * * * person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50. Respondent signed a form that stated: "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." *Ibid.* The California Supreme Court has repeatedly held that a criminal defendant's execution of such a form constitutes a valid and enforceable consent to future searches. In reaching that conclusion, that court has relied on the fact that, as a matter of California law, a defendant cannot be compelled to accept probation against his will. Because the defendant's acceptance of probation reflects a voluntary choice, the California Supreme Court has explained, a search conducted pursuant to a term of the probation agreement like the one quoted above is properly treated as consensual and therefore reasonable under the Fourth Amendment. See pp. 11-12, 17, *infra*.

The court of appeals recognized in this case that "a person can consent to a search of his home," and that respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a. The court concluded, however, that respondent's "consent must

be seen as limited to probation searches, and must stop short of investigation searches." *Id.* at 8a. That conclusion is incorrect. Both the language of the consent form and its consistent interpretation by the California courts support the conclusion that respondent consented to searches for any reason, not simply to "probation searches." And the consent that respondent gave is valid under the Fourth Amendment and thus justifies the search in this case.

A. Respondent's Consent Extends By Its Terms To Searches Conducted For Investigative Purposes

1. A consent-to-search term, sometimes known as a "Fourth Waiver," see *United States* v. *Ooley*, 116 F.3d 370, 371 (9th Cir. 1997), cert. denied, 524 U.S. 963 (1998), is a common term of probation in California. The California Supreme Court has held that persons convicted of crimes within the State may properly be required to consent to future warrantless searches as a condition of probation, and that a consent to search obtained in that manner is valid and enforceable. See, *e.g.*, *People* v. *Bravo*, 43 Cal. 3d 600, 605-611 (1987), cert. denied, 485 U.S. 904 (1988); *People* v. *Mason*, 5 Cal. 3d 759, 764-766 (1971), cert. denied, 405 U.S. 1016 (1972). That court has also held that a state probationer's consent to search is not ordinarily limited to searches based on individualized suspicion of wrongdoing. Before the decision in *Bravo*, "some [California] Courts of Appeal ha[d] held that search conditions in probation agreements require 'reasonable cause'—defined as something less than probable cause—to search." *Bravo*, 43 Cal. 3d at 607. In *Bravo*, however, the California Supreme Court held that "if a sentencing judge believes that a 'reasonable cause' requirement is warranted in the particular case, * * * he has the

discretion to place such language in the probation search condition. Absent such express language, however, a reasonable-cause requirement will not be implied." *Id.* at 607 n.6.

2. As this Court explained in *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991), "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" As a condition of probation, respondent agreed without qualification to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50; Pet. App. 4a. There is no language in that consent that limits its scope to searches conducted for a particular reason. To the contrary, respondent's express consent to searches "by any probation officer or law enforcement officer" belies any inference of a distinction between probation and investigation searches.

3. Because consent-to-search terms similar or identical to this one are frequently included in California probation agreements, a "reasonable person" in respondent's position would be justified in construing the agreement by reference to California Supreme Court precedents. Relevant state court authority makes clear that a consent search provision like respondent's is not limited to "probation searches."

In *People* v. *Bravo*, *supra*, the court upheld a search by law enforcement officers who were acting on a tip that the probationer was involved in the sale of narcotics. 43 Cal. 3d at 602-603. The court made clear that the consent authorized searches to fulfill "the rehabilitative and reformative purposes of probation *or other legitimate law enforcement purposes.*" *Id.* at 610 (emphasis added). In *People* v. *Woods*, 21 Cal. 4th 668 (1999), cert. denied, 529 U.S. 1023 (2000), the court held that a comparable consent-to-search provision authorized a search of the probationer's residence "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both." *Id.* at 681; see *id.* at 678 (explaining that this Court's decision in *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), "supports the general conclusion that a regulation allowing warrantless searches of probationers serves to promote the rehabilitative purposes of probation *and to protect the public from probationer misconduct*") (emphasis added). In *People* v. *Robles*, 23 Cal. 4th 789, 795 (2000), the court similarly observed that "[b]y allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers." The pertinent California Supreme Court decisions therefore provide no basis on which respondent could plausibly have understood his own consent to exclude searches conducted for investigative purposes.[5]

---

[5] In *Woods* the court accepted, as supported by substantial evidence, the trial court's finding that the searching officer's "sole reason for searching the [probationer's] residence was to discover evidence against [the probationer's boyfriend] and not to investigate whether [the probationer] had violated her probation." 21 Cal. 4th at 674. The court nevertheless held that the search was authorized by the consent that the probationer had given as a condition of release on probation. *Id.* at 674-682. The court in *Woods* concluded that a focus on the subjective intent of the searching officer was inconsistent with this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996). 21 Cal. 4th at 678-

In short, neither the text of respondent's probation agreement, nor prior California Supreme Court cases involving similar agreements, furnish any basis for construing respondent's consent to exclude searches conducted for investigative purposes. Rather, respondent gave unqualified consent to searches by law enforcement officers and probation officers regardless of their purpose. That consent authorized the search in this case unless, as a matter of constitutional law, a consent of that character is invalid. As we now show, respondent's consent is not constitutionally infirm.

B. Respondent's Consent To Search Was Valid And Enforceable As Applied To Searches Conducted For Investigative Purposes

1. An individual may voluntarily give advance consent to a search

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Washington* v. *Chrisman*, 455 U.S. 1, 9-10 (1982). That principle is consistent with the general rule, articulated "in the context of a broad array of constitutional and

680. It explained that "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause and to those areas of the residence over which the probationer is believed to exercise complete or joint authority." *Id.* at 681 (citation omitted).

statutory provisions," that "presumes the availability of waiver." *New York* v. *Hill*, 528 U.S. 110, 114 (2000) (internal quotation marks omitted); see also *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"); *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

Consent must be voluntary to be constitutionally valid, *Schneckloth*, 412 U.S. at 222; *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968), but an individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. In describing the benefits of consent searches, the Court in *Schneckloth* observed that "[i]f the [consent] search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search." 412 U.S. at 228. Plainly, then, a consent search cannot be found involuntary simply because an individual consents out of a desire to avoid a greater intrusion.

This Court's decision in *Zap* v. *United States*, 328 U.S. 624 (1946), reflects the view that an individual's consent to search may be deemed voluntary even when that consent is a required condition for receipt of a valuable government benefit. The petitioner in *Zap* "entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights." *Id.* at 626.

Pursuant to statutory requirement (*ibid.*), the contract between the parties stated that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government." *Id.* at 627. Government agents subsequently inspected petitioner's business books and records over his objection. *Ibid.* This Court held that the search was lawful, explaining that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628.[6]

Zap further establishes the proposition—central to this case—that a consent to search may be granted in advance, and without specific restrictions. The defendant in *Zap* did not give consent at the time the search was conducted; to the contrary, he attempted (unsuccessfully) to prevent the search from occurring. 328 U.S. at 627. The Court nevertheless found that the defendant was bound by his prior contractual commitment to permit inspection of his books and records. *Zap* makes clear that an individual may give valid and

[6] The three dissenting Justices in *Zap* were of the view that an unlawful seizure had occurred in the course of the search and that the seized item therefore should not have been admitted into evidence at petitioner's trial. See 328 U.S. at 632-633 (Frankfurter, J., dissenting). Those Justices agreed with the majority, however, that "the Government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records." *Id.* at 632.

binding prospective consent to a *category* of searches to be performed at unspecified times in the future.[7]

Under California law, a criminal defendant may not be compelled to accept probation. Rather, "[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." *People* v. *Mason*, 5 Cal. 3d at 764 (quoting *In re Bushman*, 1 Cal. 3d 767, 776 (1970)). But under *Zap*, a defendant may validly choose to accept the benefits of release with an advance consent to search in lieu of the prison sentence that would otherwise be carried out. *Id.* at 765 ("The *Zap* case is controlling here, for it upheld the validity of an advance waiver of Fourth Amendment rights akin to the provisions of the probation condition before us.").[8]

[7] The judgment in *Zap* was subsequently vacated on other grounds. See *Zap* v. *United States*, 330 U.S. 800 (1947). This Court has continued to treat *Zap* as good law, however, and has cited it as authority for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. See *Schneckloth*, 412 U.S. at 219; *Katz* v. *United States*, 389 U.S. 347, 358 n.22 (1967); *Texas* v. *Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

[8] In assessing the validity of Fourth Waiver searches of adult probationers, the California Supreme Court has continued to rely on a consent rationale. See *People* v. *Woods*, 21 Cal. 4th at 674-676. That court has recognized, however, that parolees and juvenile probationers, who are not offered the opportunity to decline conditional release, cannot be said to have consented to searches conducted without a warrant and/or probable cause. In validating warrantless searches of such offenders without particularized cause, the California Supreme Court has instead relied on the theory that such persons have a reduced expectation of privacy in light of the conditional nature of their release, and that the interest in maintaining close supervision of such persons justifies the intrusions in question. See *In re Tyrell J.*, 8 Cal. 4th 68, 81-90

2. *The relinquishment of a constitutional right may be made through an agreement with the government*

The rule that an individual may voluntarily consent to a search that might otherwise be prohibited by the Fourth Amendment accords with the general principle that an individual may, within broad limits, enter into agreements with the government under which he forgoes the exercise of constitutional rights in return for a promise of favorable treatment. Such agreements are not rendered unenforceable simply because the waiver of rights is prompted by the desire to obtain a benefit or avoid a burden, or because the individual is forced to choose between unattractive alternatives.[9]

This Court has repeatedly recognized that a criminal defendant's guilty plea, which waives a panoply of trial rights, may be valid and enforceable even where it is motivated by the defendant's belief that he is likely to face greater punishment if he proceeds to trial. In *Brady* v. *United States*, 397 U.S. 742, 755 (1970), for example, the Court held that "a plea of guilty is not

(1994) (juvenile probationers), cert. denied, 514 U.S. 1068 (1995); *People* v. *Reyes*, 19 Cal. 4th 743, 747-754 (1998) (adult parolees), cert. denied, 526 U.S. 1092 (1999).

[9] The procedural prerequisites to a valid relinquishment of constitutional rights vary depending on the right at issue, see generally *United States* v. *Olano*, 507 U.S. 725, 733 (1993), but for Fourth Amendment rights, this Court has held that the subject need not be specifically aware of his right to refuse consent before he may voluntarily consent to a search. *Ohio* v. *Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth*, 412 U.S. at 227; see *id.* at 227-248. In any event, nothing in the court of appeals' opinion in this case suggests that its holding turned on the failure of California officials to engage in any particular colloquy with respondent at the time he signed the probation agreement.

invalid merely because entered to avoid the possibility of a death penalty." In a variety of situations, the Court recognized, a criminal "defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty." *Id.* at 751. The Court "decline[d] to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." *Ibid.*; accord, *e.g.*, *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-223 (1978); *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970).[10]

This Court has since held that the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge. See, *e.g.*, *Mezzanatto*, 513 U.S. at 209-210 ("[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea") (internal

[10] As the Court explained in *McGautha* v. *California*, 402 U.S. 183 (1971),

> [t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

Id. at 213 (citation and internal quotation marks omitted).

quotation marks omitted); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process"; defendant's guilty plea held to be voluntary even though it "may have been induced * * * by fear of the possibility of a greater penalty upon conviction after a trial"). The Court's plea-bargaining cases do not suggest that a process of negotiation is a *prerequisite* to a valid plea. Rather, the Court has simply recognized that the government does not coerce the plea by giving the defendant assurance of its likely beneficial consequences, or even by affirmatively encouraging the defendant to forgo exercise of his constitutional rights. That the terms of respondent's probation on the state charges appear not to have been the subject of negotiation therefore does not call into question the voluntariness of respondent's consent to search. It is sufficient that respondent gave his assent to those terms as part of a voluntary choice.

In *Griffin* v. *Wisconsin*, *supra*, this Court observed that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S. at 874.[11] Insofar as the

[11] In *Griffin*, this Court upheld a warrantless search of a probationer's house based on a state regulation that permitted such searches where "reasonable grounds" existed to believe that contraband would be found. The Court did not adopt a "reasonable grounds" (or other individualized suspicion) requirement as a constitutional floor, and it did not consider whether a person offered probation could validly consent to searches without individualized suspicion as a condition of release.

Constitution is concerned, respondent could have validly entered into a plea agreement that not only specified the length of his incarceration, but that provided as well for confinement in a particular penal institution with a particular level of restraint. That being the case, there is no reason that respondent could not also enter into an agreement providing for a less severe punishment—*i.e.*, release into the community on the condition that his residence could be searched at any time. See *Bravo*, 43 Cal. 3d at 609 ("A probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain.") (citing *Bordenkircher*, 434 U.S. at 360-364). Indeed, enabling defendants to consent to such search terms may further their long-term interests as a class. As the California Supreme Court observed in *Bravo*, if "a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *Ibid.*

3. *Requiring consent to search as a condition of probation is not an unconstitutional condition*

The fact that a California defendant must agree to probation does not mean that a sentencing judge's choice of probation terms is free from any constitutional constraint. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in

exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). This Court's unconstitutional conditions jurisprudence suggests that a State may not condition an individual's release on probation upon his agreement to forgo the exercise of a constitutional right—*e.g.*, the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a probationer.

A requirement that probationers consent to search, by contrast, directly furthers the State's interest in the effective administration of its probation system. The California Supreme Court has explained that, as a matter of state law, "[a] condition of probation * * * is invalid if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality." *People* v. *Mason*, 5 Cal. 3d at 764 (quoting *In re Bushman*, 1 Cal. 3d at 776-777). The court in *Mason* concluded, however, that "a condition of probation which requires a prior narcotics offender to submit to a search meets the test set forth in *Bushman*, since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses." *Ibid.*

The same reasoning explains why a consent-to-search term is not an unconstitutional condition as a matter of federal law. Probationers present a heightened risk of committing further criminal or other antisocial acts, thus justifying close monitoring and supervision. See *Griffin*, 483 U.S. at 880 ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law"). The purpose of conditional release is to assist in the probationer's reintegration into the community, while minimizing the threat to the public safety and welfare that release may entail. A search designed to assess the probationer's compliance with the conditions of his release is therefore reasonably related to the benefit offered by the government as a quid pro quo.

4. *A probationer's consent to search is not invalid simply because the alternative is imprisonment*

A probationer's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is incarceration. It has been suggested that a potential probationer or parolee has no choice but to accept a consent to search provision.[12] That suggestion appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a prison term. That proposition is demonstrably false: criminal defendants can and often do enter pleas of guilty (with or without plea agreements) that they know will result in substantial periods of incarceration, generally because they regard their alternatives as even more unattractive. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See pp. 18-20, *supra*.

---

[12] See, *e.g.*, 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 764-765 (3d ed. 1996) ("to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (footnote and internal quotation marks omitted).

Alternatively, the view that a probationer lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison *in preference to release on probation* because probation, even with a consent-to-search condition, is substantially less onerous than incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a particularly favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

5. *There is no basis for limiting the validity of respondent's consent to "probation searches"*

The court of appeals acknowledged both that "a person can consent to a search of his home," and that respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a. The court held, however, that respondent's "consent must be seen as limited to probation searches, and must stop short of investigation searches." *Id.* at 8a; see also *ibid.* ("We simply have refused to recognize the viability of a more expansive probationary consent to search term."). Although the court did not offer a precise definition of the term "probation search," it apparently had in mind a search conducted for rehabilitative or similar purposes. See *id.* at 10a (stating that the searching officer and his colleagues "were not a bit interested in [respondent's] rehabilitation" but instead "were interested in investigating and ending the string of crimes of which

[respondent] was thought to be the perpetrator"). The court of appeals' distinction between "probation" and "investigation" searches is flawed. First, the proper focus in this area of Fourth Amendment analysis is on the objective justification for the officer's conduct, not on its subjective purpose. Second, identifying criminal activity by a probationer is centrally related to a critical term of probation: that the individual refrain from further violations of the criminal law.

a. In *Whren* v. *United States*, 517 U.S. 806 (1996), this Court stated that it had consistently "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Id.* at 813. The Court explained that the "principal basis" for its refusal to consider the subjective motivation of the searching or seizing officer "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. See also *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000) (in determining whether an officer's actions constitute a "search," "the issue is not [the officer's] state of mind, but the objective effect of his actions").[13]

---

[13] In *City of Indianapolis* v. *Edmond*, 121 S. Ct. 447 (2000), the Court held that a traffic checkpoint violates the Fourth Amendment when its "primary purpose" is to serve general criminal law enforcement interests in interdicting narcotics. *Id.* at 458. The Court explained that, in contrast to cases such as *Whren* and *Bond*, "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Id.* at 457. The Court noted that "subjective intent was irrelevant in *Bond* because the inquiry that our precedents required focused on the objective effects of the actions of an individual officer." *Ibid.* This Court's consent-search precedents similarly focus on objective considerations, both in analyzing the scope of consent, see *Florida* v.

The seizure in *Whren* was based on probable cause to believe that a traffic violation had been committed, see 517 U.S. at 810, but a property owner's voluntary consent to search justifies a similar Fourth Amendment conclusion: the search is valid if it is within the scope of the consent, objectively construed, regardless of a particular searching officer's motive or purpose. The intrusion is the same in either case, and nothing in this Court's decisions suggests that the propriety of a consent search depends on the searching officer's subjective motivation in requesting or acting upon the consent.[14]

Jimeno, *supra*, and in determining the reasonableness of an officer's reliance on consent, see *Illinois* v. *Rodriguez*, *supra*. The objective approach of *Whren* and *Bond* is therefore applicable here.

[14] Different considerations would be implicated if the officers who conducted a Fourth Waiver search were alleged to have acted for constitutionally impermissible reasons—*e.g.*, on the basis of the probationer's race or religion. Compare *Whren*, 517 U.S. at 813 ("agree[ing] * * * that the Constitution prohibits selective enforcement of the law based on considerations such as race," while observing that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment"). But neither respondent nor the court of appeals has suggested that the detective who conducted the search in this case harbored any such impermissible motives. To the contrary, although the court of appeals held that the warrantless search in this case violated the Fourth Amendment, it recognized that the officer's desire to search respondent's apartment was prompted by legitimate law enforcement considerations. See Pet. App. 10a (stating that the searching officer and his colleagues "were interested in investigating and ending the string of crimes of which [respondent] was thought to be the perpetrator * * * and had drawn some very good inferences from the facts").

b. Even if consideration of the searching officer's subjective purpose were otherwise appropriate in this context, the purported distinction between "probation" and "investigation" searches is unsound. A probationer has by definition been convicted of a criminal offense, and "it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U.S. at 880. And the most fundamental term of probation is that an individual must refrain from committing further crimes. As the Court in *Griffin* explained, restrictions on a probationer's liberty "are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed." *Id.* at 875 (citation omitted).

The officer who searched respondent's apartment was not, it is true, specifically tasked with the supervision of probationers. The officer's investigative efforts focused upon respondent for reasons unrelated to his probation status, and the officer would likely have wished to search respondent's apartment even if respondent had not been a probationer. See note 3, *supra*. It does not follow, however, as the court of appeals believed, that the searching officer "was using the probation term as a subterfuge." Pet. App. 10a. Where (as here) law enforcement officials come to suspect that a probationer is engaged in additional criminal activity, a search designed to confirm or dispel that suspicion directly serves an important probation purpose, even though the searching officer views his role as the detection and investigation of crime rather than the monitoring of specific individuals. Uncovering criminal

acts by probationers allows the government to protect the community against harms flowing from their conditional release, either by revoking probation or beginning a new prosecution. The State may therefore make release on probation contingent upon the probationer's voluntary consent to searches by police officers who are investigating crimes, as well as to searches that are conducted by probation officers or specifically conceived as measures for administering the probation system.[15]

---

[15] In upholding the Wisconsin regulation authorizing probation officers to conduct warrantless searches based on "reasonable grounds" to believe that a probation violation had occurred in *Griffin*, the Court noted that a probation officer is not "the police officer who normally conducts searches against the ordinary citizen." 483 U.S. at 876. The search in *Griffin* took place pursuant to an administrative scheme. Respondent, however, specifically consented to searches "by any probation officer or law enforcement officer." J.A. 50. Whatever relevance the probation officer's distinct status and responsibilities may have to the propriety of an *administrative* program of non-consensual searches, nothing in *Griffin* precludes a State from requiring consent to searches by a broader category of law enforcement officers as a condition of release on probation.

In any event, nothing in *Griffin* suggests that an officer's motivation for conducting a *particular* search is in any way relevant to the constitutional analysis. The search in that case was conducted by two probation officers and three plainclothes policemen, based on a tip that guns were or might be present in Griffin's apartment. 483 U.S. at 871. When the officers found a handgun, Griffin was arrested and charged with possession of a firearm by a convicted felon, which is itself a felony under Wisconsin law. *Id.* at 871-872. *Griffin* thus involved a search for evidence of criminal activity. The direct and foreseeable result of the search was the probationer's arrest—and this Court reviewed his conviction for the offense that led to that arrest.

The court of appeals appeared to acknowledge that a valid probation search may be based *in part* on the desire to detect wrongdoing. Pet. App. 10a. The court suggested, however, that any search directed *only* at that goal (rather than at the rehabilitation of the probationer) cannot be regarded as a legitimate probation search. *Ibid.* That conclusion is without basis. Even where a search is conducted solely to determine whether a probationer has abused his "conditional liberty" (*Griffin*, 483 U.S. at 874) by committing crimes that warrant prosecution, the search helps to ensure "that the community is not harmed by the probationer's being at large" (*id.* at 875) and thereby directly serves a core probation purpose.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

KIRBY HELLER
Attorney

JULY 2001